non-usable space the same as the allocation of usable space. This was clearly not the intent of Congress and is not within the FCC's authority. In other parts of the Act, Congress did call for an allocation on the basis of usable space and would have done so with respect to non-usable space if that had been its intention. The FCC is not free to redraft the statute to its liking. [45]

For purposes of calculating the number of attaching entities to apportion common space each telecommunications attachment no matter how much space it requires should be presumed to count as only one attaching entity. As ICG notes, such an interpretation recognizes that all attaching parties benefit equally from the non-usable space on a pole or in a conduit, rather than in proportion to the amount of space that they occupy.[46]

E. Attachments Made By Government Agencies Should Not Be Included In The Calculation Of The Number Of Attaching Entities

A large number of the commenters join EEI and UTC in opposing the FCC's proposal that attachments made by a government agency be included in the calculation of the number of attaching entities. Section 224(a)(4) clearly indicates that the term "pole attachments" applies to attachments by a cable television system or a provider of telecommunications service. That term therefore could not include attachments by local governments for non-telecommunications purposes such as traffic signals, festoon lighting, or pedestrian lighting.[47] Thus local governments are not "attaching entities" for purposes of allocating non-usable space.

Despite the clear statutory language to the contrary some commenters attempt to argue that local government attachments should nevertheless be counted with no justification other

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[44] Carolina Power & Light, p. 6.

[45] *See Iowa Utilities Board.*

[46] ICG, p. 33.

[47] EEI and UTC agree with ICG that if a government entity is using its attachment to provide telecommunications services pursuant to a pole attachment agreement than it should be counted for purposes of apportioning the non-

than the fact that it will reduce their overall rate. For example, NCTA states while the government agency generally does not pay the pole owner directly for the use of the poles, these attachments do burden the pole plant and impose additional costs that should be borne by the utility.[48]

NCTA's argument makes no sense, since utilities are not compensated for the government attachments they should not bear the expense alone. Moreover, as ICG points out the fact that the pole owner, rather than other users are obligated to provide the free space is irrelevant. The cost of providing free space for government use is part of the cost of having the pole in the public right-of-way; it is a cost that must be shared by all users by treating the space as non-usable.[49] USTA makes a similar argument noting that but for the existence of the pole owner, every other attacher on a pole would otherwise have to install its own pole and thereby be subject to the same public interest requirement.[50] Finally, the FCC is incorrect in its statement (parroted by NCTA) that government attachments are often part of the utilities franchise agreement. Attachments by government agencies are not usually part of the utility's franchise agreement but instead are conditions placed on the municipality's pole placement authorization. Contrary to the FCC's insinuation that utilities somehow benefit from the government attachments, this is the government agency's "charge" for placing a pole on its land, and as such is a necessary cost that all users of the pole should share.

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usable space.

[48] NCTA, p. 19.

[49] ICG, p. 34.

[50] USTA, p. 13.

F. Each Overlashing Entity Subject To A Separate Attachment Fee Should Count As A Separate Attaching Entity For Purposes Of Apportioning the Costs of the Non-Usable Space

EEI and UTC agree with the American Electric Power that each entity subject to a separate attachment fee as a result of overlashing should count as a separate attaching entity for purposes of apportioning the costs of the non-usable space.[51] Counting such attachments in the apportionment of non-usable space is justified on the basis that each such overlasher benefits from the existence of the common space to the same extent as all other attaching entities. Further, as discussed above, overlashing directly impacts the loading of the pole and therefore overlashers must be required to pay for the additional burden placed on the pole.

EEI and UTC continue to recommend that the lease of dark fiber within an existing attachment or existing overlash should not be considered as a separate attachment for purposes of apportioning the cost of the non-usable space on a pole. The lease of dark fiber within an existing attachment does not impact the loading capacity of the pole.

G. Each Utility Should Develop A Presumptive Average Number Of Attaching Entities On Its Poles

The Commission should reject Comcast's proposal to develop a presumption based on a projection to 2001 of the FCC's fiber deployment report. The fiber deployment report tracks fiber in the aggregate and does not indicate in any meaningful way how many attachments are actually on utility poles. For example, in many areas of the country CLEC activity is concentrated almost exclusively in certain industrial or business corridors and does not exist in most residential areas. Further, the report does not provide an indication of where the fiber facilities are deployed in terms of distribution poles, conduits, rights-of-way. For example, Qwest is primarily installing fiber along railroad rights-of-way. Finally, Comcast uses the report

to make certain assumptions regarding future markets that are highly questionable. For example, Comcast assumes an ever-increasing number of CLECs which ignores the current wave of consolidations and inevitable shakeout that will occur as the industry matures.[52] In addition, Comcast assumes that every electric utility will have its own CLEC subsidiary by 2001 and yet there are only a handful nationwide now.[53]

Rather than adopting a nationwide presumption based on questionable projections and extrapolations, EEI and UTC join a number of commenters in supporting the FCC's recommendation that each utility develop, through the information it possesses, a presumptive average number of attachers on its poles. Utilities should not be required to develop different presumptive averages for urban and rural areas. This would prove administratively difficult for many utilities and should therefore only be allowed as an option for those utilities able to track this information.

VII. ALLOCATING THE COST OF USABLE SPACE

A. Allocation Of The Cost Of The Usable Space Required For Each Attachment

In calculating the cost of usable space under new section 224(e)(3) EEI and UTC renew their recommendation that the FCC recognize that under the new rules the FCC is to look at the amount of space an attaching entity requires rather than what it merely occupies. Accordingly, it is recommended that the FCC ensure that attaching entities be responsible for space allocations that are required in order to accommodate their attachments, including clearances and NESC

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[51] American Electric Power, p. 42.

[52] For example, if the recently announced WorldCom merger with MCI and Brooks Fiber takes place three of the largest potential CLEC competitors will be replaced by one. Similarly, if GTE's bid for MCI prevails it is unlikely that GTE and MCI will enter the same markets.

[53] While a number of utilities are deploying fiber and leasing capacity on a carrier's carrier basis this is almost exclusively along transmission corridors and not along distribution plant such as poles.

requirements. This would include for example mid-span sag created by overlashing, or additional spacing requirements resulting from tightly strung fiber optics.

B. Each Overlashing Entity Subject To A Separate Attachment Fee Should Be Considered As Having A Separate Attachment

EEI and UTC agree with Union Electric that each overlashing entity that is subject to a separate attachment fee should be considered as a separate attacher for purposes of attributing usable space. Overlashers should be presumed to occupy/require at least one foot of usable space. Such a presumption is warranted because, as discussed above, overlashing often requires additional space on the pole to maintain separations and clearance because of increased line sag.

EEI and UTC do not believe that the lease of dark fiber by a third party, where permitted, from within an existing attachment or an authorized overlash has an impact on the amount of usable space required by an attaching entity. Accordingly, EEI and UTC do not believe an allocation of any usable space should be attributed to entities that lease dark fiber from within existing attachments.

VIII. CONDUIT ATTACHMENT ISSUES

A. There Are Fundamental Operational Differences Between Utility Conduit and Telecommunications Conduit

Despite the efforts of EEI and UTC, as well other utility representatives, to educate the participants in the on-going attachment proceedings to the inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits, there continue to be efforts on the part of some attaching entities to treat all conduit the same. The FCC must not be misled by these commenters. Electric conduits have very different, specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224.

B. Conduit System Access Costs Should Be Based On A Forward Looking Pricing Methodology

EEI and UTC concur with Carolina Power & Light that in those instances when the parties fail to reach an agreement regarding conduit access it is particularly appropriate that the FCC utilize a forward looking pricing methodology to establish the value of ducts and conduits. ICG correctly notes that in light of the fact that a great deal of utility conduit is relatively old, and the book cost is not representative of the cost a utility may eventually incur to construct additional capacity for its own use, it is more appropriate to base conduit rates on current costs rather than embedded accounting costs.[54] Forward looking pricing also recognizes that ducts and conduits actually appreciate in value and therefore an historical cost approach would result in a dramatic under-valuation which translates into a massive subsidization of telecommunications companies by electric utility customers and shareholders. Requiring below-market access to valuable utility property would be an unconstitutional government taking.

Finally, EEI and UTC wish to emphasize that any calculation of a just and reasonable conduit rate must be based on a conduit system as a whole, including ducts, conduit, cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities. Not recognizing such costs would also amount to an unconstitutional taking, and would violate the clear intent of the Act.

C. A Half Duct Methodology Is Inappropriate For Electric Utility Conduits

A number of attaching entities eagerly embrace the FCC's proposed half-duct methodology as the amount of space used by a cable system or telecommunications carrier. However, as EEI and UTC pointed out in their comments the proposal is wholly inappropriate for the pricing of access to electric utility conduit.

The half-duct formula assumes the ability of one attaching entity to share a duct with another "attaching entity." However, in the electric utility context such sharing is practically impossible because of the incompatibility of electric cables and telecommunications cables within the same duct. Contrary to ICG's insinuation, the fact that some utilities install telecommunications lines within their duct banks does not contradict this point because utilities very rarely utilize the same duct for the installation of electric cables and telecommunications Lines, and never for cables owned by others as required by the NESC. For all practical purposes the existence of a telecommunications "attachment" within a utility duct renders the entire duct non-usable for the electric utility. At a minimum this suggests the use of a full duct methodology.

Moreover, it is not a simple matter of merely avoiding ducts that are presently occupied by utility conductors because utilities require reserve ducts for the rapid restoration of power, and the existence of telecommunications cable within these ducts would preclude their use for electrical service. As EEI and UTC noted in their comments, pulling electric cable through a duct when necessitated by a cable failure would destroy the smaller communications cable. In the electric utility context "spare ducts" that must be open on a "hot-standby" basis should be distinguished from "reserved ducts" that are available for future use and "maintenance ducts" that are used to provide access to all other ducts to conduct repairs.

EEI and UTC renew their recommendation that in order to minimize the intrusion and confiscation of utility property, first-installing telecommunications companies should be required to install inner duct as part of make-ready, for subsequent telecommunications entities seeking

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[54] ICG, p. 52.

attachments, from whom they may recoup their expenses. In some areas this is already a common practice.

D. Non-Usable Conduit Space

In order to minimize their attachment rates a number of attaching entities attempt to argue that there is no non-usable space within a conduit. For example, AT&T argues that all conduit space is usable.[55] This argument ignores the fact that maintenance ducts are often provided for the use of all attaching entities to conduct repairs and is therefore effectively non-usable for a new attachment. In addition, AT&T ignores the fact that municipal governments often require the use of a duct for their own purposes as part of the right to install a conduit system. Like local government attachments on utility poles, the reservation of duct space by a local government is a common cost of underground facility that all users must bear equally and should therefore be assigned to non-usable space.

Similarly, the efforts of NCTA to read the non-usable space provision out of the statute for the establishment of conduit rates is equally self-serving and unpersuasive. Section 224(e)(3) clearly contemplates that conduits have a non-usable space component. Just as non-useable space on a pole includes the buried portion of a pole, the non-usable space in a conduit system must necessarily encompass all elements of the system that are a common benefit to all "attaching" parties. Accordingly, in addition to maintenance ducts, and local government reserved ducts, the non-usable space includes all cement or other encasement materials, vaults, handholes, manholes and other related equipment that allow for deployment of, access to, and maintenance of cable facilities. [56]

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[55] AT&T, p. 16.

[56] NESC clearance requirements that preclude the use of adjacent conduits should also be included in the calculation of non-usable space.

E. Each Individual Cable and Telecommunications Line Should Be Counted As A Separate Attachment

EEI and UTC recommend that all cable and telecommunications lines occupying any portion of a duct should be considered a separate attaching entity for apportioning the "pole attachment" costs of underground facility. As with poles, in determining the number of attaching entities it makes no difference under the language of the Act how much space is actually being occupied by a particular wire, all occupants equally benefit from the non-usable portions of the conduit system.

IX. RIGHTS-OF-WAY ISSUES

The comments of EEI and UTC explained that utilities do not own or control the vast majority of rights-of-way used for electric distribution purposes. These rights-of-way are owned or controlled by the local or state government. The use of right-of-way has rarely, if ever, been an issue. The Commission's proceedings and cases generally have addressed issues involving physical attachments to poles, ducts, or conduits. Accordingly, its experience relating to rights-of-way circumstances is limited.

Given the FCC's admitted lack of experience with right-of-way issues, and the uncertain demand for access, EEI and UTC, as well as many other commenters, continue to recommend that the FCC adopt a policy that allows the rates for the use of rights-of-way which the utility owns in fee to be based on a negotiated amount. EEI and UTC also reiterate that rates should be based on the eminent domain compensation standard used in the particular state if negotiations fail. Negotiated rates are appropriate for property held in fee because these private rights-of-way were obtained by utilities at significant expense and must not be given by government action to telecommunications and cable entities at below market rates.

A number of parties raise issues relating to rights-of-way that are part of pending petitions for reconsideration and therefore are not appropriate to address in this proceeding. For example, some attaching entities request that utilities be required to use their powers of eminent domain on the part of attaching entities. Not only doe EEI and UTC oppose this suggestion, but also this issue is beyond the scope of this proceeding.

Still other commenters suggest that utilities should be required to utilize their supplemental rights-of-access to expand rights-of-way and easements to encompass facilities that were not originally contemplated at the time of the grant. Not only is it unclear what such "supplemental" rights of access are or whether this is even a valid concept under state property laws, but the issue of whether a third party has a right to use the real property of another under the terms and conditions of an easement granted to still another person is outside of the FCC's jurisdiction and must be resolved under state law.[57] As EEI and UTC indicated in their comments the FCC should not address compensation for easements not owned in fee. Doing so will involve the underlying fee owner and the owner's claim for compensation. If the FCC decides to address easements it must defer to state real property law.

Finally, Winstar and Teligent have improperly requested that the FCC require utilities to provide access to rooftops and riser conduit for the attachment of microwave facilities. In the

[57] In one recent case in Virginia the court indicated that broadening access to encompass other services might not be allowed for all right-of-way or for all additions, *Hise vs. Barc Electric Cooperative*, Virginia Circuit Court of Bath County, Record No. 961577, September 12, 1997. The court found that a utility easement in gross could be apportioned to allow for wire attachments where the landowner had not objected to attachment of cable and telephone wires to poles owned by the electric company for sixteen years and had, in fact, used the cable line for television reception for sixteen years. In allowing wire attachment to poles of the utility under the easement terms, but indicating that broadening access to encompass other services might not be allowed for in all right-of-way or for all additions, the Hise court is consistent with other decisions. *See*, e.g., *Consolidated Cable Utilities , Inc. v. City of Auroa*, 439 N.E. 2d 1271 (Ill. App 1982) (finding that utility easement did not allow a third-party the right to attach directly to the land by installing underground cable).

First Report and Order, in its interconnection decision, CC Docket No. 96-98, the Commission quite properly rejected this argument stating:

> *We do not believe that Section 224(f) mandates that a utility make space available on the roof of its corporate offices for the installation of a telecommunications carrier's transmission towers...*[58]

The arguments of Winstar and Teligent are not appropriate for consideration in this proceeding. Moreover, they are premised on their belief that utilities control rights-of-way on building rooftops that they should be provided access to in order to deploy wireless facilities. As a fundamental matter it should be noted that the majority of electric utilities do not, in fact, own rights-of-way on building rooftops. Most utilities enter buildings for electrical service at the ground or below ground level not on the roof. Further, electric utilities do not normally own risers in buildings. Instead this is more commonly owned by the building owner.[59] To the extent utilities do have limited access to rooftops it is likely controlled by the building owner and limited to specific electric utility related services, and it is doubtful that an electric utility easement on a rooftop would be construed broadly enough by a court to encompass microwave dish or other wireless attachments by a third-party. Certainly, the issue is questionable enough, and controlled by state law enough, to be beyond the FCC's authority.

Finally, the FCC must recognize the untenable position that Winstar and Teligent's request would put utilities in. In essence utilities would be placed between building owners and their expectation for compensation for the use of their building space and new wireless providers' desire to obtain access at a regulated below market rate. Given the increasingly competitive nature of the electric utility business, utilities should not be required to sacrifice their

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[58] FR&O, para. 1185.

[59] To a large extent the issues related to riser would appear to be more appropriately addressed in the context of the FCC's inside wiring proceedings.

good will with customers in order to accommodate a third party's telecommunications market entrance strategy.

X. IMPLEMENTATION

The new rate methodology goes into effect on February 8, 2001. Section 224(e)(4) requires that any rate increase be phased in over five years in equal annual increments beginning on that date. EEI and UTC agree with USTA's clarification that the FCC should specify that the first of these phased increases must go into effect on February 8, 2001 and that one-fifth of that amount should be added to the rate in each of the subsequent four years. Otherwise, the new rate would not go into effect until February 8, 2002.

XI. CONCLUSION

In implementing Section 224(e) the FCC's rules should enforce and exhibit a preference for negotiated agreements as the best means to carry out the intent of Congress. If the parties are unable to resolve a dispute over pole attachments the FCC should utilize forward looking pricing in order to approximate the actual value of the facilities.

The provision of any service other than cable television, including internet, takes a cable company outside the realm of section 224(d) and at a minimum subjects them to the new fully-allocated cost formula of 224(e). Overlashing has operational and administrative impacts that require a separate agreement with the pole owner. In addition, overlashing by an attaching entity or a third-party constitutes a separate attachment. In contrast, the use of dark fiber within existing lines by attaching entities should not be regulated as a separate attachment under the Act.

The Commission's tentative conclusion that the 40-inch safety space emanates from a utility's requirement to comply with the NESC and should properly be assigned to the utility as

part of its usable space should be rejected. The safety space comes from the need to protect communications workers from electric lines. It would not exist but for the presence of telecommunications cables and their workers on utility poles. If not assigned to the usable space of telecommunications and cable companies, EEI and UTC reiterate that, at a minimum, the safety space be considered as "other than usable space" and be apportioned equally among all of the attaching entities.

Only "attaching entities" as defined under the Act are to be counted for the apportionment of non-usable space. The consensus of commenters agree with the FCC's conclusion that the apportionment of common costs is expressly limited to those entities obtaining pole attachments to provide "telecommunications services," and therefore does not include electric utility attachments that are used to provide electricity. Nor does the Act apply to non-telecommunication service attachments by governmental entities. Finally, because ILECs are not "attaching entities" under the statute it is appropriate that they not also be counted in the two-thirds apportionment.

The FCC must recognize the inherent operational differences between electric utility ducts and conduits and telecommunications ducts and conduits. Electric conduits have specific safety and reliability considerations that warrant special caution by the Commission in its application of the provisions of Section 224. Any calculation of a just and reasonable conduit rate must be based on a conduit system. The FCC's proposed half-duct methodology is wholly inappropriate for the pricing of access to electric utility conduit. Rates for the use of right-of-way which the utility owns in fee should be based on a negotiated amount or on the eminent domain compensation standard used in the particular state if negotiations fail.

WHEREFORE, THE PREMISES CONSIDERED, the Edison Electric Institute and UTC respectfully urge the Commission to take action on this *Notice of Proposed Rulemaking* in accordance with the views expressed in their initial and these reply comments.

Respectfully submitted,

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